No. 12,188

IN THE

United States Court of Appeals

For the Ninth Circuit

MARION J. MURPHY, ELIZABETH IRENE SWARTZ, MARJORIE JOSEPHINE PRESKEY and ROBERT MARION MURPHY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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Subject Index

Table of Authorities Cited

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BRIEF FOR APPELLEE.

Appeal from a judgment and order made by the United States District Court for the Northern Division of the Northern District of California, after trial before the Court on an action filed under the provisions of the Federal Tort Claims Act. The Court on August 3, 1948, by the filing of a written opinion ordered that judgment be entered for the defendant, United States of America. Findings of Fact and Conclusions of Law were made and entered on September 21, 1948. Thereafter plaintiffs moved to amend the findings and conclusions and judgment and moved for a new trial. Upon denial of these motions plaintiffs perfected their present appeal.

JURISDICTION AND FACTS.

The appellants have fairly stated the matter of jurisdiction so far as the right to institute and maintain the present action is concerned and have correctly cited Section 377 of the Code of Civil Procedure of the State of California as giving a right of action to the heirs-at-law against the alleged tortfeasor.

The appellants have also, for the most part, correctly stated the circumstances under which the accident in question took place and although the Government did not admit negligence on the part of Sergeant Brander who was operating the Army truck, it did not purport to deny such negligence in so far as the occurrence of the accident and it will be presumed the facts presented were sufficient on which the Court may have found such negligence if it were an issue in the case.

The Government, on the other hand, takes issue with the statement of appellants that "the trial Court adopted the deposition of Lt. Simon *in toto* in reaching his decision, and utterly rejected the deposition of Sgt. Brander." In such respect it will be later pointed out that the deposition of Sgt. Brander equally supports the judgment of the trial Court and that there is every reason to believe it was fully relied upon in reaching such decision.

QUESTION PRESENTED.

The sole question presented here before this Circuit Court of Appeals is the determination of the question as to whether Sgt. Brander at the time of the accident was acting in the scope of his office or employment or in line of duty which later consideration is part and parcel of the former, acting in the scope of his office or employment.

APPELLANTS' ASSIGNMENT OF ERROR.

The appellants have assigned seven specific instances of error on the part of the trial Court but it is submitted that these specifications of error are all concerned with the sole consideration as set forth in the legal question presented. If the trial Court correctly determined that Sgt. Brander was not at the time of the accident acting within the scope of his office or employment, nor acting in line of duty there has then been no error committed by the trial Court.

ARGUMENT.

The appellants have properly stated that the Appellate Court is in as good a position as the trial Court to appraise the evidence which has been introduced by deposition and in this respect may make independent consideration of such evidence. It is of course submitted that such a consideration by this

tribunal will result in the same conclusion and decision as that reached by the trial Court.

It is also further submitted, however, that the decisions do accord some weight and import to the judgment reached by the trial Court in its judgment in the matter. This is only in accordance with good sense and sound reasoning, otherwise in the case of introduction of evidence by deposition it would follow that the trial in the first instance should have been before the Appellate Court rather than the trial Court. It will therefore be assumed that the trial judge in the instant case has given thorough consideration to the evidence presented and the law applying in the reaching of the final judgment entered.

The Government has admitted that the Army carryall truck operated by Sergeant Brander at the time of the accident in question was the property of the United States Government and has also admitted that Sgt. Brander was at such time a soldier in the United States Army and has, on the other hand, denied the claim that Sgt. Brander at the time of the accident was acting within the scope of his office or employment, or was acting in the line of duty. A conclusion in favor of the Government in this respect results in a denial of liability on the part of appellee for the accident resulting in the death of Mrs. Huldah Murphey.

An examination of the deposition of Lt. Simon who was the officer in charge of the United States Army camp at the time of the accident in question

discloses that personnel of the camp was permitted from time to time to drive Army vehicles into the town of Klamath as transportation for recreational purposes. This privilege was extended by Lt. Simon as officer in charge so as to enable such Army personnel to enjoy certain recreational facilities provided for in the town of Klamath. However, as stated by Lt. Simon the use of the Army trucks from time to time was not extended to any one particular soldier but was so provided for as to create a use resulting in a common benefit. In this respect it would be ridiculous to assume that Lt. Simon would have any authority to authorize such use for the personal enjoyment of any particular soldier. The United States Army could not by regulations or otherwise turn over Army vehicles to any soldier who at a particular time desired to use it for some personal venture. To so assume would be placing, to say the least, a considerable undue burden and hardship on the taxpayer as well as resulting in a most distorted construction of the language employed in the Federal Tort Claims Act. Consequently, although it is admitted that the United States of America did provide recreational activities for its members it was so provided for the common benefit of all and cannot be employed for the personal benefit or enjoyment of any one member. It then becomes clear that in the instant case the use of the Army truck was solely for the purpose of transporting the members or a group thereof of this particular radar camp to the

town of Klamath, which members after arriving at that point might enjoy their recreation in the town.

The following questions and answers set forth in the deposition of Lt. Simon discloses the matter of authority so far as the use of the Army truck on July 12, 1945, the date of the accident in question (R.T. pp. 31, 32, 35):

"Q. On the night of July 12, 1945, did Sergeant Brander have such authority to drive a pass truck into the town of Klamath?

A. Yes.

Q. What time did he leave the Camp for Klamath, if you know?

A. Unknown.

Q. Can you give us the approximate time?

A. Approximately 6:30 or 7:00 o'clock in the evening, which was usually the regular time they went in.

Q. What was the purpose of his driving that pass truck into Klamath that night?

A. His purpose was to transport the rest of the boys stationed there into the town for entertainment, movies, etc.

Q. Do you know how many passengers he carried that evening?

A. I don't know.

Q. Do you know, of your own knowledge, whether Sergeant Brander had any other authority to use the pass truck for any other purpose or purposes on July 12, 1945?

* * * * * * *

A. No, he had no authority.

* * * * * * *

Q. Was Sergeant Brander to remain with the truck at all times during that evening while in Klamath?

A. No: he was free to seek his own entertainment and then drive the boys back to the camp in the evening about 10:00 to 11:00 o'clock.

Q. When you say he was 'free to seek his own entertainment,' was he also free to use that pass truck during that evening?

A. No.

* * * * * * *

Q. What was supposed to happen to the truck while they were seeking entertainment?

A. Parked alongside a building in town, and left there until it was ready to come back.

Q. Is that how far his authority went for the use of the pass truck?

A. Yes."

There is no dispute in respect to the authority of Lt. Simon over the personnel and operation of the radar camp and it would appear from the testimony above set forth and also from other questions and answers set forth in the deposition of Lt. Simon that the use of the Army truck was to have been confined solely to the transportation from the camp to the town of Klamath and later that evening for the transportation of the Army personnel from the town of Klamath back again to the camp. Clearly there was no authority for the personal use of this truck by any one or more members of the camp as was done by Sgt. Brander and Sgt. Warneck who accompanied Sgt. Brander on their trip to the Shaker

meeting which was being held some distance from the center of town where the truck had been parked. As indicated the truck was to remain parked in town as had been the case in the past until the group as a whole was ready to return to camp.

An examination of the questions and answers contained in Sgt. Brander's deposition also clearly supports the conclusion that the operation of the Army carry-all at the time of the accident was outside "the scope of the office of employment" within the meaning of the language contained in the Federal Tort Claims Act. The answers of Sgt. Brander state in undeniable terms that he had no right to take the Army truck from the point where he had parked it in the town of Klamath and start on a personal venture with another member of the camp. It is disclosed that the habit in the past and one that was in conformity with directions was to park the carry-all in the town during the period of recreation enjoyed by the group and to leave such truck at that point where all of the members of such group would meet for their return to camp, and of course, even in the absence of such a specific direction, this would be the only sensible manner of operation. Otherwise, any members of such group going to the town might after reaching town take the Army truck for his own personal pleasure leaving the other members of the group with no transportation back to camp at the termination of the evening's recreation.

It is submitted that the following answers of Sgt. Brander fully support the statements made by Lt. Simon concerning the unauthorized use of the Army truck (R.T. p. 81):

"Q. What is the highest number of men that you carried on either the carryall or one of the other motor vehicles from the camp to the town?

A. About six or seven at the most.

Q. Six or seven?

A. Yes.

Q. And what arrangements were made for you men to go back to camp after the evening was over? Would you meet at one particular place, or how would you go about it?

A. Well, we would meet where the carry-all was parked until everybody got there, and everybody went back together unless they had other means of getting back or they were not going on duty that night."

And again on page 86 of the Reporter's Transcript the following question and answer by Sgt. Brander discloses the unauthorized use of the Army truck:

"Q. Can you tell us what infraction of the rules, if any, you might have been guilty of, if you were?

A. It might have been the unauthorized use of the vehicle."

Also, on page 92 of the Reporter's Transcript the following question and answer supporting the contention of the Government:

"Q. When you say you were permitted to take an Army vehicle from the camp to the town of Klamath, was that permission only for the purpose of transporting fellow soldiers to Klamath? Is that correct?

A. Yes."

It is submitted that the deposition of Sgt. Brander fully supports the judgment and order of the trial Court in determining that at the time of the accident in question the operation of the Army truck by Sgt. Brander was an operation outside of the "scope of his office or employment" as a government employee operating such vehicle and that this same operation which was purely in connection with a personal pleasure trip of Sgt. Brander was also action not in line of duty within the terms and provisions of the Federal Tort Claims Act. Except for slight discrepancies the answers of Sgt. Brander by deposition are not in conflict with those contained in the deposition of Lt. Simon but to the contrary substantially support in substance Lt. Simon's deposition which discloses an authorized use of the vehicle at the time of the accident and a use which prevents appellants from any right of recovery under the Federal Tort Claims Act.

There is no conflict in the decisions which deny recovery in the situation where the employee utilizes the employer's vehicle for his own personal business or pleasure. A number of leading cases supporting that established rule of law are as follows:

Hanchett v. Wiseley, 107 Cal. App. 230;
Lane v. Bing, 202 Cal. 577;
Kish v. California S. Automobile Assn., 190 Cal. 248;
Walters v. West. Am. Ins. Co., 4 Cal. App. (2d) 583;
Newman v. Steurernagel, 132 Cal. App. 417;
Weber v. Allen Co., 64 Cal. App. 274;
Grissim v. Blumenthal & Co., 76 Cal. App. 712;
Bourne v. North. Counties Title Ins. Co., 4 Cal. App. (2d) 69.

Appellant seeks to place great importance on the distinction that he seeks to make in distinguishing between "scope of his office or employment" and "acting in line of duty" as applying to a member of the military or naval forces. However, it is respectfully submitted that insofar as the provisions of the Federal Tort Claims Act are concerned that proof of the fact that the employee was acting outside of the scope of his office or employment but to the contrary was pursuing solely a personal pleasure venture, *ipso facto,* takes such action or conduct on his part outside of the purview of action in line of duty. The cases cited by appellant in this regard all relate to conduct on the part of military and naval personnel which conduct or action was proven to be directly related in some manner to the duty owed by the actor to the employer, the United States Government. This is a necessary requisite in finding that the actor was in the line of duty even though such action or conduct at the time involved recreation or

pleasure. The outstanding decisions in support of the position of the Government in this respect are as follows:

La Bella v. Southwestern Bell Telephone Co., 23 S.W. (2d) 1072;

Collins v. Dollar S. S. Lines, D.C.N.Y. 23 F. Supp. 395;

Hutchens v. Covert, 78 N.E. 1061;

Rhodes v. United States, 79 F. 740.

It is respectfully submitted that the evidence presented in defense of the action in the instant case supports the sound conclusion that Sgt. Brander's operation of the truck at the time of the accident in question was wholly unauthorized either by direction or implication and that under the provisions of the Federal Tort Claims Act the appellants are barred from a recovery of damages as against the United States Government for the conduct of the employee. It cannot be denied that the use of the truck at the time in question was wholly and completely a personal use for pleasure on the part of Sgt. Brander and his passenger and it was never intended that there should be recourse as against the taxpayer for negligence committed by the Government employee under such circumstances. In order to support a right of recovery under circumstances such as presented in the instant case the evidence should be uncontradicted in support of the authority of the particular operation at the time, and as heretofore pointed out the uncontradicted evidence fully supports the unauthorized use.

CONCLUSION.

It is submitted that the judgment should be affirmed.

Dated, August 15, 1949.

Respectfully submitted,

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